

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

RODERICK ANDRE MCGUIRE,

Defendant-Appellant.

UNPUBLISHED

July 25, 2006

No. 260421

Jackson Circuit Court

LC No. 04-000543-FC

Before: Donofrio, P.J., and O'Connell and Servitto, JJ.

PER CURIAM.

Defendant appeals as of right from his conviction by a jury of first-degree felony murder, MCL 750.316(b). Because there was sufficient evidence upon which to convict defendant, the jury instructions correctly summarized the applicable law, and the pre-arrest delay did not deny defendant his right to a fair trial, we affirm.

This case arises out of the shooting death of James Crowley in 1980. Defendant drove his brother, who he knew to be armed, to a certain neighborhood so his brother could commit an armed robbery. Defendant dropped his brother off, then waited for him near a stop sign. During the course of the attempted robbery, Mr. Crowley was shot and killed. Defendant was charged on or about April 4, 2004 with armed robbery and felony murder in connection with the shooting. The armed robbery charge was dismissed but the felony murder charge proceeded to jury trial, at the conclusion of which defendant was found guilty. Defendant was sentenced to life imprisonment without the possibility of parole for his conviction.

On appeal, defendant first claims there was insufficient evidence to establish he had the required malice to support a conviction of felony murder. We disagree.

To determine whether there was sufficient evidence to support a conviction, we review the evidence de novo, in the light most favorable to the prosecution, and decide whether any rational fact-finder could have found that the essential elements of the crime were proven beyond a reasonable doubt. *People v Johnson*, 460 Mich 720, 723; 597 NW2d 73 (1999). "Circumstantial evidence and reasonable inferences arising from that evidence can constitute satisfactory proof of the elements of a crime." *People v Allen*, 201 Mich App 98, 100; 505 NW2d 869 (1993).

Felony murder consists of,

(1) the killing of a human being, (2) with the intent to kill, to do great bodily harm, or to create a very high risk of death or great bodily harm with knowledge that death or great bodily harm was the probable result [i.e., malice], (3) while committing, attempting to commit, or assisting in the commission of any of the felonies specifically enumerated in [the statute . . .].^[1] [*People v Nowack*, 462 Mich 392, 401; 614 NW2d 78 (2000), quoting *People v Carines*, 460 Mich 750, 758-759; 597 NW2d 130 (1999).]

“A jury may infer malice from evidence that the defendant intentionally set in motion a force likely to cause death or great bodily harm. Malice may also be inferred from the use of a deadly weapon.” *Carines*, *supra* at 759.

Here, the prosecution relied on an aiding and abetting theory in the case against defendant. “The phrase ‘aids or abets’ is used to describe any type of assistance given to the perpetrator of a crime by words or deeds that are intended to encourage, support, or incite the commission of that crime.” *People v Moore*, 470 Mich 56, 63; 679 NW2d 41 (2004). In general, to convict a defendant of aiding and abetting a crime, the prosecutor must establish that (1) the crime charged was committed by the defendant or some other individual; (2) the defendant performed acts or gave encouragement that assisted in the commission of the crime; and (3) the defendant intended the commission of the crime or had knowledge that the principal intended its commission at the time that the defendant gave aid and encouragement. *Id.* at pages 67-68. The intent required for aiding and abetting is the same intent required of the principal for commission of the underlying crime. *People v Kelly*, 423 Mich 261, 278; 378 NW2d 365 (1985). Thus, to convict defendant of felony murder on an aiding and abetting theory, it must be shown that he had the intent to kill, the intent to cause great bodily harm or wantonly and willfully disregarded the likelihood of the natural tendency of his behavior to cause death or great bodily harm (malice). *Id.*

In the instant matter, defendant admitted that he had the intent to drive his brother, the principal offender, to an armed robbery. Defendant also admitted he knew his brother had a gun. Those two facts alone are sufficient to establish malice given that participation in an armed robbery where a defendant is aware that one of the co-actors is armed with a deadly weapon has been found to allow an inference of malice, because it is participation in an act where there is a “wanton and willful disregard of the possibility that death or great bodily harm would result.” *Carines*, *supra* at 760. Therefore, knowledge that a co-felon in an armed robbery has a gun is sufficient to allow a rational trier of fact to find the required malice for felony murder. *People v Turner*, 213 Mich App 558, 572-573; 540 NW2d 728 (1995), overruled in part on other grounds *People v Mass*, 464 Mich 615; 628 NW2d 540 (2001).

It is immaterial to this issue that defendant, when he admitted knowing his brother had a gun, also said his brother told him it did not function properly. The jury was free to disbelieve defendant’s claimed beliefs about the functioning of the gun, see *People v Perry*, 460 Mich 55, 63; 594 NW2d 477 (1999) (“a jury is free to believe or disbelieve, in whole or in part, any of the

¹ Relevant to this case, robbery is one of the crimes enumerated in the felony murder statute. MCL 750.316(b).

evidence presented”). Moreover, there was no testimony that the gun was completely inoperative. Therefore, when all of the evidence is taken in the light most favorable to the prosecutor, *Johnson, supra* at 723, there is sufficient evidence to support defendant’s conviction for felony murder.

Defendant next claims that the jury instructions improperly allowed a jury to convict him of felony murder without explicitly finding he had the required malice for felony murder. We disagree.

Claims of instructional error are reviewed de novo. *People v Hall*, 249 Mich App 262, 269; 643 NW2d 253, rem’d on other grounds 467 Mich 888 (2002). The relevant instructions are examined in their entirety to determine if reversal is required. Even if the instructions are not perfect, however reversal is not required “as long as they fairly presented the issues to be tried and sufficiently protected the defendant’s rights.” *People v Aldrich*, 246 Mich App 101, 124; 631 NW2d 67 (2001).

The crux of defendant’s complaint about the jury instructions is that they did not make clear to the jury the requirement of finding malice on the part of defendant to support a conviction of felony murder. Defendant’s intent in that regard is handled in the jury instructions as follows:

. . . Defendant must have intended the commission of the crime alleged or must have known that the other person intended its commission at the time of giving assistance.

* * *

Second, that his brother had one of these two states of mind. He intended to do great bodily harm to James Crowley, or he knowingly created a very high risk of death or great bodily harm, knowing that death or such harm would be the likely result of his actions.

Although they were essentially blended, these are the correct aiding and abetting and felony murder instructions. Albeit somewhat imperfect, the instructions as a whole fairly presented the issues to be tried and sufficiently protected defendant’s rights. As such, we find no error in this regard. See, *People v Lawton*, 196 Mich App 341, 351-352; 492 NW2d 810 (1992).

Moreover, under MCL 769.26, “no judgment or verdict shall be set aside or reversed or a new trial be granted by any court of this state in any criminal case, *on the ground of misdirection of the jury*, or the improper admission or rejection of evidence, or for error as to any matter of pleading or procedure, unless in the opinion of the court, after an examination of the entire cause, it shall affirmatively appear that the error complained of has resulted in a miscarriage of justice [emphasis added]. See also, *People v Dumas*, 454 Mich 390, 408-409; 563 NW2d 31 (1997). Here, the evidence clearly established that defendant agreed to drive his brother to a neighborhood to commit an armed robbery, knowing his brother was armed with a gun, shared the proceeds of the armed robbery with him, then helped his brother dispose of the gun. Taking into account the above, and keeping in mind that malice may be inferred from surrounding

circumstances (*Carines*, *supra* at 760; *Turner*, *supra* at 572-573), this Court is not convinced that any error in the jury instructions resulted in a miscarriage of justice.

Defendant next claims that he was denied the effective assistance of counsel because his trial counsel may not have properly preserved for appeal problems with the jury instructions. We disagree. Because defendant did not raise this issue below, appellate review of defendant's claim of ineffective assistance of counsel is limited to the existing record. *People v Snider*, 239 Mich App 393, 423; 608 NW2d 502 (2000).

To establish a claim of ineffective assistance of counsel, a defendant must satisfy a two-pronged test. The defendant must show that (1) counsel's performance was below an objective standard of reasonableness under professional norms, and (2) there is a reasonable probability that, if not for counsel's errors, the result would have been different. *People v Carbin*, 463 Mich 590, 599-600; 623 NW2d 884 (2001). As explained above, the jury instructions were correct as given, and did not warrant reversal, whether any objection to them was preserved or not. Further, trial counsel did properly preserve the matter for review by objecting to the jury instructions below. Therefore, defendant has not shown that trial counsel's performance fell below an objective standard of reasonableness.

Finally, defendant claims that his right to due process was violated by an undue pre-arrest delay. We disagree.

"A challenge to a pre-arrest delay implicates constitutional due process rights, which this Court reviews de novo." *People v Cain*, 238 Mich App 95, 108; 605 NW2d 28 (1999). Before dismissal may be granted because of pre-arrest delay there must be (1) actual and substantial prejudice to the defendant's right to a fair trial and, (2) an intent by the prosecution to gain a tactical advantage. *People v Crear*, 242 Mich App 158, 166; 618 NW2d 91 (2000). "To be substantial, the prejudice to the defendant must meaningfully impair his ability to defend against the charges against him in such a manner that the outcome of the proceedings will likely be affected." *Id.* Proof of prejudice requires more than just generalized allegations. *Id.*

There is no evidence on the record that the prosecution intentionally delayed bringing this case to gain tactical advantage. Indeed, defendant does not even allege intentional delay. Therefore, the second prong of the test for undue pre-arrest delay fails. The first prong also fails, for two reasons. First, while defendant focuses his argument largely upon the difficulties with witness' memories due to the passage of time, such difficulties "are generally insufficient to establish actual and substantial prejudice." *People v Crear*, *supra*. Second, while it is true that two key witnesses are unavailable for defendant's trial due to their deaths, defendant did not specify exactly what these witnesses would have said that would have exonerated him or otherwise changed the outcome of the trial, and generalized allegations are insufficient to establish prejudice. Further, transcripts of their testimony in defendant's brother's trial was available and could potentially have been used by defendant, but he declined to do so. As a result, defendant has not shown that his right to due process was violated by pre-arrest delay.

Affirmed.

/s/ Pat M. Donofrio
/s/ Peter D. O'Connell
/s/ Deborah A. Servitto